FILE COPY

Supreme Court U.S.
FILED
JUN 17
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1014 154

IN THE MATTER OF
JOSEPH E. NAMOFF and JULIUS NAMOFF, etc.
Alleged Bankrupt,

Petitioner,

vs.

HYLAND ELECTRICAL SUPPLY COMPANY, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE COHAN and
MAX COHEN
738 Broadway
Gary, Indiana
Counsel for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Specifications of Errors to be Urged	4
Reasons For Granting The Writ	4
Summary of Argument	10
Conclusion	10

AUTHORITIES

Cases

Allen v. Powell, 56 Ind. App. 601, 115 N.E. 96, 20 Am. Jur. Sec. 679 Et seq.	7
Durham v. Shannon (1888) 116 Ind. 403	7
Duval, In re, 103 Fed. 2d 653	4
Ganapowski, In the Matter of, 27 Fed. Supp. 41 (1939)	7
Garden City Brewery, In re, CCA 7 208 Fed. 2d. 377	4
Golden, In re, DCSC, N.Y., (1952) 108 Fed. Supp. 503	7
Inmann, In the Matter of, DC, Main (1957) 157 Fed. Supp. 506	7
Jones v. Burnham, 138 Fed. 986 (1905)	7

PAGE

Kaplan, In re, 234 Fed. 866 (1916) 7

Moynahan Const. Co. v. Mohler, 75 N.E. 2d. 540, 225 Ind. 375 8

Phillips v. Walker, CCA 5 (1948) 165 Fed. 2d. 578 7

Watson v. Watson, 231 Ind. 385, 108 N.E. 2d. 893 8

STATUTES

General Order 47, 11 USC Sec. 53 9

Burns Annotated Indiana Statutes 50-401 et seq. 8

APPENDICES

Appendix A.—Findings of Fact, Conclusions of Law and Judgment of the Referee in Bankruptcy .....App. 1-4

Appendix B.—Opinion of the District Judge on Petition for Review .....App. 5-7

Appendix C.—Judgment of the United States District Court ..... App. 8

Appendix D.—Opinion of the Seventh Circuit Court of Appeals .....App. 9-17

Appendix E.—11 USC Sec. 53, General Order 47 ..App. 18

IN THE

SUPREME COURT OF THE UNITED STATES

No.

IN THE MATTER OF
JOSEPH E. NAMOFF and JULIUS NAMOFF, etc.
Alleged Bankrupt,

Petitioner,

vs.

HYLAND ELECTRICAL SUPPLY COMPANY, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on March 22, 1960.

OPINIONS BELOW

The memorandum opinion of the Referee in Bankruptcy is unreported. The opinion of the District Court is not reported. The opinion of the Circuit of Appeals is reported in 275 Fed. 2d 14.

JURISDICTION

The opinion of the Seventh Circuit Court of Appeals was filed and entered on February 19, 1960. A petition for re-hearing was filed within the time allotted. The Court of Appeals denied the petition for re-hearing on March 22, 1960. The jurisdiction of this Court is invoked under 28 USC 2101.

QUESTIONS PRESENTED

1. Whether the findings of the Referee in Bankruptcy that no partnership existed as between two individuals can be upset on petition for review by the district judge if there is competent evidence to sustain the finding of the Referee in Bankruptcy.

2. Whether the opinion of the Seventh Circuit Court of Appeals is in conflict with opinions of the Second Circuit Court of Appeals rendered on the extent of the scope of review of the District Court Judge on petition for review and of the Court of Appeals on appeal from the order from the district judge.

3. Whether the opinion of the Seventh Circuit Court of Appeals changes the rule that in order to establish a partnership in bankruptcy a partnership-in-fact must be established by clear and convincing proof and subsidiary to that question whether or not a partnership by estoppel is sufficient to establish a partnership in bankruptcy.

STATUTES INVOLVED

General Order 47, 11 USC Sec. 53.
Burns Annotated Indiana Statutes 50-401 *et seq.*

STATEMENT

An involuntary petition in bankruptcy was filed on March 24, 1956 against the petitioner Julius Namoff who was charged with being a co-partner with one Joseph E. Namoff, trading under the firm names of Chicago Wholesale Distributors and Junior's Country Fair. The petition charges the partnership with committing an act of bankruptcy in that it made a general assignment for the benefit of creditors while insolvent (Petitioner's Appendix 1-3). To this petition the petitioner Julius Namoff filed answer denying the existence of the partnership and made demand for trial by jury. The cause was then referred to the Honorable Russel H. Nehrig, Referee in Bankruptcy, for the United States District Court for the Northern District of Indiana on the question of the existence of a partnership and after hearing evidence on this question the referee concluded that no partnership existed and submitted findings of facts, conclusions of law and judgment denying the existence of the partnership (Petitioner's Appendix 26-28). Thereafter petitioning creditors filed their petition for review (Petitioner's Appendix 25-38). The United States District Court granted the petition for review and vacated the order of the District Court, 275 Fed. 2d 14.

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In going beyond the scope of review permitted by General Order 47, 11 USC Sec. 53.

2. In deciding an important state question on the law of partnership which is in conflict with the applicable state law of Indiana.

3. In holding in effect that a partnership by estoppel is sufficient to establish a partnership in bankruptcy.

4. In affirming the order of the District Court.

REASONS FOR GRANTING THE WRIT

This Court should grant the within writ for the reason that the questions involved present serious problems involving the administration of the bankruptcy act in the following particulars:

The decision of the Court below in the instant case and in *In re Duval*, 103 Fed. 2d 653, and *In re Garden City Brewery, Inc.*, CCA 7 208 Fed. 377, upon the authority of which the instant case was decided are directly in conflict with the decision of the Second Circuit Court of Appeals in *Morris Plan Industrial Bank* v. *Henderson*, 131 Fed. 2d 975. In the *Duval* case, the Court of Appeals for the Seventh Circuit enunciated the substantial evidence rule; that is, the district judge may exercise his judgment even though it may be contrary to the finding as made by the referee and when the Court's judgment has been thus exercised, the Appellate Court is not at liberty to disturb the same except where it might conclude there was no substantial evidence or theory which would justify the Court in reaching a conclusion contrary to that of the referee.

This holding is in direct conflict with the holding of the Circuit Court of Appeals in the *Morris Plan* case which holds that the Court of Appeals as well as the District Court is required to accept the Referee's findings of fact unless the same are clearly erroneous and unless there is no evidence in the record to support the findings of the referee.

That there is competent evidence to sustain the findings of the referee is clearly demonstrated by the following excerpts from the record:

Both the district judge and the Circuit Court of Appeals concluded that the referee's finding of fact No. 1 (Petitioner's Appendix p. 26) is clearly erroneous when the referee states that there is no evidence in the record that the goods, wears and merchandise supplied by the petitioner, Julius Namoff, and used by Joseph Namoff were other than sale transactions or capital contributed by Julius Namoff to a partnership business (Petitioner's Appendix p. 90). There is not one shred of evidence in the record to indicate that these transactions were other than what the referee found them to be. There is ample evidence to sustain this particular finding of fact.

> "That he started the business known as Chicago Wholesale Distributors with merchandise that his brother sold him on credit." (Testimony of Joseph E. Namoff, Petitioner's Appendix p. 64, Lines 1 to 3).

> "That he started the business Junior's Country Fair in 1954 . . . that the reason he had the policies listed as Julius and Joseph Namoff, d/b/a Junior's Country Fair, was because he got his start from his brother and he wanted to make his brother feel he would get something for what he owed him." (Testimony of Joseph Namoff, Petitioner's Appendix p. 66, Lines 11 to 17).

The district judge, in his opinion, and adopted by the Court below, states that there is clear evidence in the record that the trucks owned by Julius Namoff were used by Joseph Namoff under arrangements other than a lease. There is not one shred of evidence in the record to sustain that conclusion of the district judge. On the contrary there is ample evidence to sustain the referee's findings that the trucks were used under a lease arrangement.

> "That he received certain checks made payable to himself; that he was paid for truck expenses; that he was leasing a truck to his brother . . . that the reason that Junior's Country Fair would pay him for car expenses would be if something went wrong with the truck." (Testimony of Julius Namoff, Petitioner's Appendix, p. 76, Lines 7 to 12).

Both the District Judge and the Court below concluded that the referee's finding of fact No. 4 was clearly erroneous insofar as the referee stated that the evidence showed the purposes of Julius Namoff in sending signature cards was to secure the indebtedness of Joseph Namoff to Julius Namoff. There is no evidence in the record to sustain the conclusion of the district judge. There is ample evidence to sustain the finding of the referee as to what the intent of the parties was in signing these signature cards.

> "That he, his wife and Julius Namoff signed checks for the merchandise; that the reason Julius Namoff signed checks was because Joseph had borrowed a stock of merchandise from his brother Julius and had promised to pay him for the same; that after a week or so passed he didn't pay him and his brother Julius wanted the stock back; that in order to secure payments from the merchandise he took his brother to the bank and had him sign a card so that only Julius and Joe's wife, Ida, could sign the checks." (Testimony of Joseph Namoff, Petitioner's Appendix p. 65, Lines 3 to 12).

Declarations explaining a business or commercial transaction are admissible as part of the *res gestae, Durham* v. *Shannon* (1888), 116 Ind. 403.

Declarations of the parties made with regard to the matters of business contemporaneous with the acts they tend to explain and qualify are admissible as part of the *res gestae, Allen* v. *Powell,* 56 Ind. App. 601, 115 N.E. 96, 20 Am. Jur. Sec. 679 *et seq.*

Where the referee's findings are based upon conflicting evidence and where there has been oral testimony his findings should not be disturbed.

In re Golden, DCSC, N.Y. (1952), 108 Fed. Supp. 503.

In the Matter of Inmann, DC, Main (1957), 157 Fed. Supp. 506.

Phillips v. *Walker,* CCA 5 (1948), 165 Fed. 2d. 578.

Thus it is clear that there was ample evidence to sustain the findings of the referee.

As further ground for granting the petition the petitioner urges that the opinion of the Court of Appeals evades the rule that in bankruptcy proceedings a partnership in fact must be established by clear and convincing proof.

In the Matter of Ganaposki, 27 Fed. Supp. 41 (1939).

In re Kaplan, 234 Fed. 866 (1916).

In re Hudson Clothing Co., 148 Fed. 205 (aff'd), 153 Fed. 525 (aff'd), 213 U.S. 453 (1906).

Jones v. *Burnham,* 138 Fed. 986 (1905).

In considering whether or not a partnership-in-fact has been established, the Court of Appeals was bound as was the referee and the district judge to follow the substantive law of Indiana as to the elements necessary to constitute a partnership. Indiana has adopted the Uniform Partner-

ship Act, Burns Annotated Statutes 50-401, *et seq.* This statute has been construed by the Supreme Court of the State of Indiana in the case of *Watson* v. *Watson*, 231 Ind. 385, 108 N.E. 2d 893. The *Watson* case holds that there must be, one, a voluntary contract of association for the purpose of sharing the profit and losses as such which may arise from the use of capital, labor or skill in a common enterprise and, two, an intention on the part of the principals to form a partnership for that purpose.

In vacating the judgment of the referee, the district judge emphasized the case of *Moynahan Const. Co.* v. *Mohler*, 75 N.E. 2d 540, 225 Ind. 375 and quoted from that case the following statement:

> "It may be stated that when parties agree to do that which in law constitutes or creates a partnership, it is not material that the parties declare that it shall not be such an association. While the intent of the parties is material, it is the intent to do or to accomplish certain given things as such things are construed in the law."

That case is clearly distinguishable upon its facts. Plaintiff in that case had filed an action for the appointment of a receiver having alleged the existence of a partnership, and the necessity of a receiver to preserve his existing interest in said partnership. The evidence disclosed that the defendant had entered into a contract with the U. S. Public Housing Authority for 1,500 units. That he held conversations with the plaintiff concerning said contract. That the parties signed a memorandum under the terms of which the defendant agreed to pay the plaintiff 25 per cent of the fees to be received. That the plaintiff furnished one quarter of the working capital together with a part of his working organization. That the plaintiff furnished sums totalling $25,000.00 and had been paid $11,000.00 as its

share of $44,000.00 of fees received. That the plaintiff did not make a partnership report to the Gross Income Tax Division of the State of Indiana or a partnership return for Federal income tax purposes. The trial court denied plaintiff's application for the appointment of a receiver and did not specifically pass upon the question of whether a partnership existed. The Supreme Court affirming the trial court held that there was not such evidence that would have compelled the conclusion that a partnership relationship had been brought into being.

Certainly that case, which the district judge relies upon for finding a partnership in the case at bar, has a great deal more substance to it than the present case. The statement that the court cites from the opinion of that case may be true as an abstract statement of the law but the very case itself discloses the necessity that an actual partnership-in-fact must be established. There was far more commingling of funds and community of interest in the *Moynahan* case than in the case at bar.

The holding of the Court of Appeals in effect is that the documentary proof adduced by the petitioning creditors irrespective of any explanations offered by the parties is sufficient to establish a partnership. In short, the holding eliminates the necessity of proving a partnership-in-fact and now states that a partnership by estoppel is sufficient. The effect of this holding is to emasculate General Order 47 and to render the role of the referee completely ineffectual. The factors of credibility of the witnesses and demeanor which the referee had an opportunity to observe are now completely irrelevant. In this connection it is interesting to note the viewpoint adopted by the Court of Appeals in the Second Circuit as to the responsibility of the referee.

"Everyone forms his conclusions from testimony not only from the words which he hears the witnesses utter, but from their appearance when they utter them and the added weight to be attached to a referee's finding or to a judge's if he sees the witnesses depends upon the fact that he has in effect had evidence before him which cold print does not preserve. So far, therefore, as the words themselves leave any latitude the referee's conclusion ought to prevail because we can not appraise the cogency of the lost evidence. In the end, as we have often said, the responsibility for the right conclusion remains the Judge's, as, indeed, it does ours . . . but we have again and again held that except in plain cases he should accept the referee's findings." *Morris Plan Industrial Bank* v. *Henderson*, CCA 2 (1942), 131 Fed. 2d. 975.

SUMMARY OF ARGUMENT.

In summation petitioner's argument is essentially this:

1. That there is a conflict of opinion in the Circuits as to the scope of review of a Referee in Bankruptcy's finding.

2. That the opinion of the Seventh Circuit Court of Appeals insofar as it purports to define what is necessary to constitute a partnership-in-fact constitutes a departure from the applicable local law of the State of Indiana.

3. The opinion of the Seventh Circuit Court of Appeals in effect holds that a partnership-in-fact need not be established in a bankruptcy proceeding but that a partnership by estoppel may be sufficient.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE COHAN and MAX COHEN
Counsel for Petitioner.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

* * (Caption—Bankruptcy No. 4628) * *

Findings of Fact, Conclusions of Law and Judgment of the Referee in Bankruptcy.

The Court having previously heard the evidence and arguments of counsel and having examined briefs filed by counsel upon the issue of the existence or nonexistence of a partnership between the bankrupt, Joseph E. Namoff, and the alleged bankrupt, Julius Namoff, in the operation of the businesses described as Chicago Wholesale Distributors and Junior's Country Fair, pursuant to the order of November 7, 1956, entered by the Honorable Luther M. Swygert, Judge, United States District Court, Northern District of Indiana, directing the undersigned Referee to hear same, and said matter having been taken under advisement, the Court now enters its findings of fact, conclusions of law and judgment as follows:

FINDINGS OF FACT

1. That Julius Namoff supplied goods, wares and merchandise used by Joseph E. Namoff in commencing operation of Chicago Wholesale Distributors and supplied other merchandise during the course of the operation thereof. That there is no evidence in the record that same were other than sale transactions or that they were capital contributions by Julius Namoff to any partnership business.

2. That Julius Namoff paid for a store license for Junior's Country Fair and paid for a utility deposit, but that there is no evidence in the record that same were

intended as contributions to capital of the named businesses.

3. That Joseph E. Namoff on occasions used trucks belonging to Julius Namoff in the operation of said named businesses, but that the only evidence in the record as to same was that said use was under a lease arrangement for which Julius Namoff received no consideration.

4. That Julius Namoff signed signature cards at Calumet National Bank of Hammond and Mercantile National Bank of Hammond, purporting to show himself as a partner in the business of Chicago Wholesale Distributors and Junior's Country Fair and signed large numbers of bank checks in connection with the businesses conducted under the name of Chicago Wholesale Distributors and Junior's Country Fair; that the evidence shows the purpose therefor was to secure the indebtedness of Joseph E. Namoff to Julius Namoff.

5. That there is no evidence in the record that Julius Namoff other than through such control as was represented by being one of the authorized signers of bank checks, exercised any managerial duties or control in the businesses known as Chicago Wholesale Distributors and Junior's Country Fair or that he shared in any profits or losses derived from or incurred in said businesses.

6. There is some evidence that a representative of Dun & Bradstreet was led to believe that Julius Namoff was the sole owner of said named businesses, but there is no evidence that any such information was disseminated to anyone dealing with said named businesses or that anyone relied upon Julius Namoff as being the owner of same.

7. There was direct testimony by representatives of six creditors of Joseph E. Namoff that they did not regard

Julius Namoff as a partner in said named businesses and did not look to Julius Namoff for payment of the debts incurred by Joseph E. Namoff in said named businesses, and there is no evidence in the record that any creditor of said named businesses did regard, or rely upon, Julius Namoff as being a partner in said named businesses.

8. That there is no evidence in the record of any written or oral partnership agreements between Joseph E. Namoff and Julius Namoff.

9. That income tax returns and other tax returns were filed individually and separately by Joseph E. Namoff and Julius Namoff and that there is no evidence in the record of the filing of any tax returns indicating the existence of a partnership between Joseph E. Namoff and Julius Namoff.

10. That the evidence shows that Julius Namoff operated his own separate businesses.

CONCLUSIONS OF LAW

1. That, on the basis of the evidence in the record, a formal partnership was not created in writing or orally by and between the bankrupt, Joseph E. Namoff, and the alleged bankrupt, Julius Namoff, in connection with the named businesses.

2. That on the basis on the evidence in the record, such acts as were taken by either Joseph E. Namoff or Julius Namoff as might have indicated the existence of a partnership were not so taken as to cause or induce creditors of Joseph E. Namoff to regard or rely upon Julius Namoff as being a partner of Joseph E. Namoff in the operation of the said named businesses.

3. That the allegations of the petition of creditors herein as to the existence of a partnership between the bankrupt, Joseph E. Namoff, and the alleged bankrupt, Julius Namoff, are not sustained by the evidence taken herein and that the creditors' petition should be denied upon the issue of the existence of such partnership.

JUDGMENT

It Is Ordered, that the creditors' Second Amended Petition for Adjudication should be, and the same is hereby, denied upon the issue of the existence of the partnership between the bankrupt, Joseph E. Namoff, and the alleged bankrupt Julius Namoff, in the operation of the businesses named in said petition.

Russell H. Nehrig
Referee in Bankruptcy

Entered: November 7, 1957

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

(Caption—Bankruptcy No. 4628)

Opinion on Petition for Review.

(Filed June 18, 1959)

After due consideration, I have concluded that the Referee's Finding of Fact Number 1 is clearly erroneous when he states there is no evidence in the record that the goods, wares and merchandise supplied by Julius Namoff and used by Joseph E. Namoff in commencing operation of Chicago Wholesale Distributors and during the course of its operation were other than sale transactions or capital contributed by Julius Namoff to a partnership business.

I am of the same opinion with regard to his Finding of Fact Number 2 that there is no evidence that when Julius Namoff paid for a store license for Junior's Country Fair and a utility deposit it was intended that these were contributions to a partnership business.

I am of the same opinion with regard to his Finding of Fact Number 3. I believe there is clear evidence in the record that the trucks owned by Julius Namoff were used by Joseph Namoff under arrangements other than a lease. Although a lease was claimed, no lease was produced at the trial. There was no evidence of any payments of rent. Although the titles were in the name of Julius Namoff residing in Illinois, the registrations were in Indiana. The purported reason was to avoid Illinois taxes.

I am impelled to conclude that the Referee's Finding of Fact Number 4 is clearly erroneous insofar as he states that the evidence shows the purpose of Julius Namoff in signing signature cards at Calumet National Bank of Hammond and Mercantile National Bank of Hammond was to secure the indebtedness of Joseph E. Namoff to Julius Namoff. These signature cards in my opinion are strong evidence of a partnership. They expressly state the existence of such an arrangement. When considered with the other evidence relating to the accounts in these two banks, as well as to the entire conduct between Julius and Joseph E. Namoff, these cards indicate clearly that Julius Namoff's purpose in signing them was other than to secure Joseph E. Namoff's indebtedness to him.

It is true that there is no evidence in the record of any written or oral partnership agreements between Joseph E. Namoff and Julius Namoff. However, a partnership may exist in law in the absence of a formal partnership arrangement, written or oral, and even in the face of an express stipulation that the alleged partners do not intend to form partnership. This is settled law. One late enunciation of the principle in Indiana is found in *Moynahan Const. Co.* v. *Mohler*, 75 N.E. 2d 540, 225 Ind. 375. There the court said:

> "It may be stated that when parties agree to do that which in law constitutes or creates a partnership, it is not material that the parties declare that it shall not be such an association. While the intent of the parties is material, it is the intent to do or to accomplish certain given things as such things are construed in the law."

Accordingly, the Referee should have considered the conduct of the alleged partners in deciding whether a partnership existed.

It is my opinion that the evidence when considered as a whole shows conduct that clearly points, if not to a partnership arrangement between Joseph E. Namoff and Julius Namoff, at least, to an intention to do the acts which constituted a partnership.

Besides the transactions and events alluded to in the foregoing paragraphs, there are numerous other facts that compel this conclusion. Among these was the obtaining of a loan by Julius Namoff from Mercantile National Bank of Hammond of $2,051.00, the proceeds of which were deposited to the account of Junior's Country Fair. Another loan from Calumet National Bank of Hammond was evidenced by a note signed by Joseph Namoff and Julius Namoff and his wife. The proceeds of this loan, $6,000.00 were deposited to the account of the Chicago Wholesale Distributors. Four insurance policies were issued in the name of Joseph Namoff and Julius Namoff, doing business as Junior's Country Fair and Chicago Wholesale Distributors. The premiums for these policies were paid by checks signed by Julius Namoff drawn on the accounts of Junior's Country Fair and Chicago Wholesale Distributors. The Chicago Wholesale Distributors obtained and paid for Blue Cross insurance for Julius Namoff without any evidence of the consideration for this purchase.

I think the Referee was clearly erroneous in making his Conclusions of Law Number 1 and Number 3 and in entering the judgment which forms the basis of the petition for review. The judgment entered by the Referee should be vacated and a different judgment entered.

Luther M. Swygert
Judge

June 18, 1959
Lafayette, Indiana

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

(Caption—Bankruptcy No. 4628)

Judgment.

(Filed June 18, 1959)

In accordance with the opinion filed herein today, the judgment entered by the Referee on November 7, 1957 is hereby set aside and vacated.

Further, on the basis of the opinion, it is now ORDERED that the creditors' Second Amended Petition for Adjudication should be, and the same is hereby, granted upon the issue of the existence of a partnership between the bankrupt, Joseph E. Namoff, and the alleged Julius Namoff, in the operation of the business named in said petition.

Enter:

Luther M. Swygert
Judge

June 18, 1959
Lafayette, Indiana

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1959, JANUARY SESSION, 1960

No. 12766

In the Matter of JOSEPH E. NAMOFF and JULIUS NAMOFF, ETC., Alleged Bankrupt,

Defendants-Appellants,

v.

HYLAND ELECTRICAL SUPPLY COMPANY, ET AL.,

Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

February 19, 1960

Opinion of the Seventh Circuit Court of Appeals.

Before HASTINGS, *Chief Judge,* KNOCH and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* Hyland Electrical Supply Company, Chauncey's, Inc., both Illinois corporations with their principal place of business in Chicago, Illinois, and Henry M. Wolf, of Chicago, Illinois, on March 24, 1956, filed in the district court a petition in which it was alleged, among other things, that Joseph E. Namoff and Julius Namoff (sometimes referred to as Julius Namoff, Jr.), both of

Hammond, Indiana, were co-partners, trading under the firm names of Chicago Wholesale Distributors and Junior's Country Fair, and that while insolvent the said partnership and Joseph E. Namoff and Julius Namoff each committed an act of bankruptcy in that they had previously made a general assignment for the benefit of creditors. To this petition Joseph E. Namoff filed his consent to adjudication. Julius Namoff filed an answer denying the existence of the partnership and made demand for trial by jury. Petitioning creditors moved to strike the request for jury trial insofar as it related to the issue of the existence of a partnership.

The district court, on November 7, 1956, entered an order allowing the motion to strike insofar as it pertained to the partnership issue and referred such issue to a referee in bankruptcy. The referee, after a rather extensive hearing, submitted his report which included findings of fact, conclusions of law and judgment denying the existence of the partnership. Thereafter, petitioning creditors filed their petition for review. Julius, the alleged bankrupt, filed his motion to dismiss such petition, which motion was denied by the court.

The court, as shown in a memorandum opinion, decided that the material findings as well as the conclusions of law of the referee as they related to the partnership issue were clearly erroneous. Thereupon, the court, on June 18, 1959, entered its judgment, vacating and setting aside that entered by the referee, and allowed the petition for review on the partnership issue. From this judgment Julius, the alleged bankrupt, appeals.

The contested issues as stated by appellant (Julius) are whether (1) the district judge erred in denying his request for a jury trial; (2) the district judge erred in

overruling his motion to dismiss the petition for review, and (3) the district judge erred in vacating the judgment of the referee which denied the existence of a partnership between the bankrupt, Joseph, and the alleged bankrupt, Julius, in the operation of the businesses named in the petition.

We think this court is without jurisdiction to entertain contested issues 1 and 2. The notice of appeal seeks a review only of the judgment entered June 18, 1959. Contested issue 1 seeks a review of an order partially denying a jury demand, entered November 7, 1956. Contested issue 2 seeks a review of an order denying a motion to dismiss the petition for review, entered November 20, 1958. Thus, the first order was entered some two and one-half years, and the second order some seven months, prior to the entry of the order appealed from. Clearly, both orders were interlocutory, from which the aggrieved party had a right to appeal. Title 11 U.S.C.A. Sec. 47. Time to appeal, however, is limited to a maximum of forty days from the entry of an allegedly erroneous order. Title 11 U.S.C.A. Sec. 48. If only contested issues 1 and 2 were involved, the appeal would be subject to dismissal. *Roberts* v. *Bank of America Nat. Trust & Savings Assn. et al.*, 198 F.2d 919; *In re Butts*, 123 F.2d 250, 251. The fact that an order was subsequently entered from which an appeal was taken is no aid to the right of review of those previously entered. Of the many cases which have so held we cite two of this court. *In re Trust No. 2988 of Foreman Trust & Sav. Bank*, 85 F.2d 942, 943, and *In re Irving-Austin Bldg. Corp.*, 96 F.2d 905, 906.

We hold that contested issues 1 and 2 are not subject to review, and there is no point in discussing them. Even so, we have considered the arguments of the respective parties on these issues and have no doubt but that the court's order as to each was correct.

This brings us to the important issue as to whether the district court erred in entry of the order from which this appeal comes, that is, the order vacating the judgment of the referee on the issue of existence of a partnership. The solution of this issue encompasses the perplexing problem as to our scope of review. A reading of the many cases where the problem has been entertained by courts of various circuits reveals some contrariety of opinion. Appellees seem to believe that the scope of review, as announced by decisions of this court, is broader in this circuit than in some of the others and cite *In re Duvall et al.*, 103 F.2d 653, *In re United States Finance Corp.*, 104 F.2d 593, and *In re Webb* v. *Frisch et al.*, 111 F.2d 887.

There is no doubt but that a district judge is empowered by statute to review the order of a referee. Title 11 U.S.C.A. Sec. 11 provides, "The courts * * of bankruptcy [district courts] are invested * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title [Bankruptcy] * * to * * Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings * *." This broad statutory power bestowed upon a district court is qualified by General Order in Bankruptcy 47, following Section 53, which provides, "* * the report of a referee * * shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous."

We think it would be a waste of time and effort to discuss or even cite the many cases where courts have attempted to elucidate on the right and power of a reviewing court. We are faced with the problem of either affirming or reversing the order of the district court from which

the appeal is taken, which requires a determination as to whether it was erroneously entered. This in turn depends upon whether the district court erred in its findings and conclusion that those made by the referee were "clearly erroneous."

The district court, in connection with its judgment now under review, filed a memorandum opinion in which it discussed the various findings made by the referee in support of his conclusion that no partnership relation existed between Julius and Joseph Namoff. In support of its conclusion to the contrary, the district court in its memorandum expressly found that each of such findings made by the referee was clearly erroneous and stated its reasons therefor. We have made a careful study of the testimony and have no hesitancy in stating that if we were the triers of the facts we would, as the district court did, reach a conclusion different from that of the referee. Even with the serious limitation which General Order 47 places upon the authority of a district court to set aside an order of a referee, we still think the district court reached the correct result.

It must be kept in mind that General Order 47 is directed at the findings of the referee and not at the conclusions drawn therefrom. It is apparent that the referee, erroneously we think, treated the issue of partnership as one of fact. In our judgment, it is a conclusion or at any rate an ultimate fact to be deduced from those which are evidentiary. In *Stewart* v. *Ganey*, 116 F.2d 1010, the issue was whether there had been a concealment of assets by the bankrupt. The court set aside the finding of concealment made by a referee and held that there was no concealment. The court reasoned that the issue of concealment "was an ultimate question of fact" which could be decided by the district court without regard to General Order 47. Thus,

the judgment of the district court, which had vacated the order of the referee, was affirmed. In this connection, we are impressed with the soundness of a statement in *Costello* v. *Fazio*, 256 F.2d 903, 908, "Where a finding of fact by the referee is based upon conflicting evidence, or where the credibility of witnesses is a factor, a district court and, on appeal, a court of appeals will seldom hold such a finding clearly erroneous. The same reluctance is not encountered with regard to a factual conclusion from given facts. In the latter case, the proper conclusion from given facts can be made by the trial judge, or the court of appeals, as well as the referee."

That the referee treated the issue of partnership as one of fact is further emphasized by the admission, over objection, of a line of testimony which permitted lay witnesses to express their opinion on that issue. For example, creditors were permitted, over objection, to state in substance that they dealt with Julius and Joseph Namoff as individuals and not as partners. It is reasonable to think that the reference attached weight to this line of improper evidence, and it is equally reasonable to think that the district court, as it had a right to do, discarded it.

It would unduly burden this opinion to give more than a brief summary of the evidence heard by the referee. It is pertinent to note that much of it was documentary, which the district court was in as good a position as the referee to evaluate. For instance, the two businesses in question each maintained an account in the Mercantile National Bank and later in the Calumet National Bank. These accounts for both businesses were obtained in each bank pursuant to a partnership authority. These authorities were substantially in the same form. That given to the Calumet National Bank reads, "The undersigned desire to establish with you a demand deposit and checking

account to be known as Chicago Wholesale Distributors, and the undersigned hereby certify that the said name is a partnership trade name used in the conduct of an unincorporated business, owned entirely by the undersigned as co-partners." This authority further stated, "We have agreed that checks and orders for the payment of money withdrawing funds from said account may be signed in the name of the partnership by any one (1) of the following named persons: Joseph Namoff, Ida Namoff [wife of Joseph], Julius Namoff." Each of these parties signed the authority as a partner in Chicago Wholesale Distributors. The similar authority given to the Mercantile National Bank provided that only two persons were permitted to draw on said account, namely, Julius Namoff, Jr. and Ida Namoff. In this connection, it is significant that while Joseph claimed to be the sole proprietor of the businesses he was not permitted to draw checks on the account maintained in the Mercantile National Bank. On the other hand, Julius, who denies he was a partner, was one of the two persons authorized to draw on this account. On at least two occasions money was borrowed from the banks on notes signed by Julius, Ida and Joseph, and deposited in the accounts of the businesses. Payments of these bank loans were made by checks on which Julius was a co-signer, on the accounts of the businesses.

During the relevant period there were in force and effect at least four insurance policies covering the named businesses. These policies were purchased and issued in the names of Joseph E. Namoff and Julius Namoff, doing business as Junior's Country Fair and Chicago Wholesale Distributors. Another policy was issued in the name of Julius Namoff, naming Julius as assured, d/b/a Junior's Country Fair, located at 7046 Kennedy Avenue, Hammond, Indiana. At least six other policies listed Julius,

d/b/a Junior's Country Fair. All of these policies were paid for out of the accounts of the alleged partnership business. Julius was insured under a Blue Cross Hospitalization policy purchased and paid for by the businesses. An invoice for merchandise, addressed to Julius, was paid by check signed by Julius and drawn on the account of Chicago Wholesale Distributors. The original deposit required to obtain electrical service for the said businesses was paid by Julius. A store license was purchased by Julius for Junior's Country Fair. Throughout the conduct of these businesses trucks were used which were owned by Julius and registered in his name. Checks for car expense were drawn on these business accounts, payable to Julius. Receipt forms were used which listed a business admittedly owned by Julius individually and one of the businesses in question. Julius carried an Illinois Bell Telephone credit card issued and paid for by the named businesses.

The above is a brief re'sume' of the documentary proof. There was also testimony that Julius had stated that he and his brother were in business together, and that Julius represented to an agent of Dun and Bradstreet that he was the principal owner of Chicago Wholesale Distributors. On the other hand, there was testimony, largely that of Julius and Joseph, which attempted to explain or refute the documentary proof. There was also, as previously discussed, improperly received testimony by witnesses who were permitted to express an opinion upon the partnership issue.

It appears that the referee attached weight to the fact that there was no proof of a formal partnership agreement between Julius and Joseph and to their denial that such a relation existed. In response to this reasoning, the district court stated, and we think properly:

> "It is true that there is no evidence in the record of any written or oral partnership agreements between

Joseph E. Namoff and Julius Namoff. However, a partnership may exist in law in the absence of a formal partnership arrangement, written or oral, and even in the face of an express stipulation that the alleged partners do not intend to form partnership. This is settled law. One late enunciation of the principle in Indiana is found in *Moynahan Const. Co.* v. *Mohler*, 75 N.E. 2d 540, 225 Ind. 375. There the court said:

> 'It may be stated that when parties agree to do that which in law constitutes or creates a partnership, it is not material that the parties declare that it shall not be such an association. While the intent of the parties is material, it is the intent to do or to accomplish certain given things as such things are construed in the law.' "

We think it plain that the acts and conduct of Julius and Joseph relative to the named businesses were such as to make them partners as a matter of law. This is so irrespective of what their intentions might have been in that respect.

The order appealed from is

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX E.

---

11 USC Sec. 53, General Order 47

Order 47. Reports of Referees and Special Masters:

Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept the findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions. Added May 31, 1932; amended Apr. 17, 1933; June 1, 1936; Jan. 16, 1939, eff. Feb. 13, 1939.

FILE COPY

Supreme Court, U.S.
FILED
JUL 16 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [redacted] 154

IN THE MATTER OF
JOSEPH E. NAMOFF and JULIUS NAMOFF, etc.,
Alleged Bankrupt,

Petitioner,

vs.

HYLAND ELECTRICAL SUPPLY COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PORTER R. DRAPER,
504 Broadway,
Gary, Indiana,
Counsel for Respondents.

STULTS, CUSTER, DRAPER and KANE,
504 Broadway,
Gary, Indiana,
Of Counsel.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

INDEX.

	PAGE
Statutes and Rules Involved	1
Additional Statement of Facts	2
Summary of Argument	4
Argument	6
Conclusion	26
Appendix	27

AUTHORITIES.

Cases:

Abrams v. Astor, et al, 170 F. 2d 544, (CA 2, 1948) 16
Aetna Life Insurance Co. v. Kepler, 116 F. 2d 1, (CCA 8, 1941) 6
Allen, R. M., as Trustee v. R. A. Watkins, 234 F. 2d 925 (CA 5, 1956) 16
Barnes v. Barnes, 355 Mich. 458, 94 N.W. 2d 829 (1959) 21
Baumgartner v. United States, 322 U.S. 665 (1944) 17
Boyce v. Chemical Plastics, Inc., 175 F. 2d 839 (CA 8, 1949) 16
Brunson v. Burch, 79 F. Supp. 833 (1948, D.C., Cal.) 20
Comstock v. Institutional Investors, 335 U.S. 211 (1948) 11
Costello v. Fazio, 256 F. 2d 903 (1956, CCA 9) 17
District of Columbia v. Pace, 320 U.S. 698 (1944) 7, 8
Duval, In re, 103 F. 2d 653 (1939, CA 7) 13, 15
Eggleston v. Eggleston, 228 N.C. 668, 47 S.E. 2d 243 (1948) 24
Fergus Falls Woolen Mills Co., In re, 41 F. Supp. 355 (1941, D.C., Minn.) 11
Garden City Brewery, Inc., In re, 208 F. 2d 377 (1953, CA 7) 4, 13, 15

Garver & Opray, Inc., In re, 203 F. 2d 690, (CA 6, 1953) 16
Goldberg v. Goldberg, 276 App. Div. 1084, 95 N.Y.S. 2d 77 (1958) 24
Greenbay & Mississippi Canal Co. v. Patent Paper Co., 173 U.S. 179 (1899) 26
Haulk v. Fry, 167 Neb. 398, 93 N.W. 2d 183, (1958) 21
Heath, et al v. Helmick, 173 F. 2d 156 (CA 9, 1949) 16
Hedgeside Distillery, In re, 123 F. Supp. 933 (1952, D.C., Cal.) 11
Joseph v. Donover Co., 261 F. 2d 812 (CA 8, 1959) 21
Katz Underwear Co. v. United States, 127 F. 2d 965 (CCA 3, 1942) 6
Keen v. Jason, 19 Misc. 538, 187 N.Y.S. 2d 825, (1959) 21
Kelley, In re, 85 F. Supp. 316 (1949, D.C., Cal.) 11
Long Beach v. Kirk, 165 Cal. App. 2d 470, 332 P. 2d 131 (1959) 21
Mercer v. Vinson, 85 Ariz. 280, 336 P. 2d 854 (1959) 21
Morasco, In re, 233 F. 2d 11 (1956, CA 2) 17
Morby Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1939) 7
Morris Plan Industrial Bank v. Henderson, 131 F. 2d 975 (1942, CA 2) 13, 14
Nelson v. Seaboard Surety Co., 269 F. 2d 882 (CA 8, 1959) 23
N. L. R. B. v. Columbian Co., 306 U.S. 292 (1939) .. 8, 9
Peck v. Peck, 21 Ill. App. 2d 118, 157 N.E. 2d 279 (1959) 21
Pioch, In re, 235 F. 2d 903 (1956, CA 3) 17
Porterfield, C. B., In re, 249 F. 2d 634 (CA 5, 1957) 17
Pringle Engineering & Mfg. Co., In re, 164 F. 2d 299 (CA 7, 1947) 16
State Farm Mutual Auto. Ins. Co. v. Bonacci, 11 F. 2d 412 (CCA 8, 1940) 6
Topper, In re, 229 F. 2d 691 (CA 3, 1956) 17
Tyne, J. J., In The Matter of, 257 F. 2d 310 (1958, CA 7) 17

Vlahis v. De Weese, 216 Md. 384, 140 A. 2d 665 (1958) 21
Walling v. Plymouth Mfg. Co., 139 F. 2d 78 (CA 7, 1943) 21
Watson v. Watson, 231 Ind. 385, 108 N.E. 2d 893 (1952) 20, 21, 23
Wolf, In re, 165 F. 2d 707 (CA 3, 1947) 16
Wyman v. Davis, 223 So. C. 172, 74 S.E. 2d 694 (1953) 24

Miscellaneous:

Clark and Stone, Review of Findings of Fact, for U. Chi. L. Rev. 190 (1937) 7
4 Collier Bankruptcy, 2218 (14 Ed., 1942) 13
Stern Review of Findings of Administrators, Judges and Juries, A Comparative Analysis, 58 Harv. L.R. 70 (1944) 7, 8, 9

Statutes:

Ind. Acts, 1949, Ch. 114, p. 283 ..... 25, 28
10 Burns' Indiana Statutes, Pt. 1, 355 § 50-406 Partnership Defined 25, 28
10 Burns' Indiana Statutes, Pt. 1, 360 § 50-416 Partnership by Estopped 25, 28
General Order 47 ..... 12, 13, 15
Rule 52(a) Federal Rules of Civil Procedure 12, 27
Rule 86(a) Federal Rules of Civil Procedure 10, 14, 27
30 Stat. 545, July 1, 1898, c. 541, § 2, as Amended; 11 United States Code § 23(a) 24, 28
30 Stat. 547, July 1, 1898, c. 541, § 2; 11 United States Code § 11(10) 6, 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 1014

IN THE MATTER OF
JOSEPH E. NAMOFF and JULIUS NAMOFF, etc.,
Alleged Bankrupt,

Petitioner,

vs.

HYLAND ELECTRICAL SUPPLY COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATUTES INVOLVED.

Rule 52(a) Federal Rules of Civil Procedure. (Appendix infra p. 27).

Rule 86(a) Federal Rules of Civil Procedure. (Appendix infra p. 27).

30 Stat. 545, July 1, 1898, c. 541, § 2, as amended; 11 U.S.C., § 11(10). (Appendix infra p. 29).

30 Stat. 547, July 1, 1898, c. 541, § 2; 11 U.S.C., § 23(a). (Appendix infra p. 28).

Ind. Acts, 1949, Ch. 114, p. 318; 10 Burns' Ind. Stat. Pt. 1, 355, § 50-406, Partnership Defined. (Appendix infra p. 28).

Ind. Acts, 1949, Ch. 114, p. 318; 10 Burns' Ind. Stat. Pt. 1, 360, § 50-416, Partnership by Estoppel. (Appendix infra p. 28).

ADDITIONAL STATEMENT OF FACTS

Respondents believe Petitioner erroneously states the sequence of appeals from the order entered by the Referee.

After a hearing on the issue of the existence of a partnership, the Referee in Bankruptcy entered findings of fact and conclusions of law on November 17, 1957 (Pet. for Writ, Appendix 1-4).

Thereafter, Respondents filed a Petition for Review and Brief in Support thereof before the District Court within the time prescribed as extended (Petitioner's Appendix 25-37 continued in Respondents' Appendix 1-87).

Petitioner filed a Motion to Dismiss the Petition for Review (Petitioner's Appendix 38-39), which was overruled by the District Court on November 20, 1958 (Respondents' Appendix 88-89).

Subsequently, the District Court reversed the Referee in Bankruptcy, sustained Respondents' Petition for Re-

view and entered an order to that affect on June 18, 1959 (Petition for Writ Appendix 5-7; Petitioner's Appendix 90-92).

Petitioner appealed from that order to the Court of Appeals for the Seventh Circuit (Petitioner's Appendix 93). On that appeal he also alleged erroneous entry of two prior orders.

The Court of Appeals concluded it was without jurisdiction to entertain an appeal from the first two orders because the review Petitioner sought was tardy. Furthermore, it determined those orders were properly entered (Pet. for Writ, Appendix 10-12).

The Court also sustained the order of the District Court reversing the Referee which granted Respondents' Second Amended Petition on the question of the existence of a partnership. 275 F. 2d 14 (CA 7, 1960).

A petition for rehearing addressed to the Court of Appeals on March 4, 1960, was denied on March 22, 1960.

The Petition for Writ of Certiorari followed.

SUMMARY OF ARGUMENT.

I.

The District Court, in reversing the Referee, properly applied the "clearly erroneous" doctrine of review which is historically less restrictive than the "substantial evidence" rule. The existence of "some" evidence to sustain the Referee does not satisfy either rule of review as Petitioner contends. Therefore, Petitioner actually seeks only a third review of the evidence which this Court has and should deny.

II.

If the District Court's application of the "clearly erroneous" doctrine of General Order 47 was correct as Respondents contend, the Court of Appeals affirmance of that decision did not violate the identical "clearly erroneous" doctrine of Rule 52(a) of the Federal Rules of Civil Procedure which binds the latter Court. Neither is there a conflict between the Courts of Appeals for the Second and Seventh Circuits on the application of the "clearly erroneous" rule. The case of *In Re Duval*, 103 F. 2d 653 (1939, CA 7) was decided on the basis of General Order 47 before that Order was amended in 1939 but after promulgation of Rule 52(a) of the Federal Rules of Civil Procedure. The dichotomy created by the "presumption of correctness" test of the unamended General Order and the "clearly erroneous" doctrine of Rule 52(a) in the *Duval* case was nonexistent when the Second Circuit later decided the case of *Morris Plan Industrial Bank* v. *Henderson*, 131 F. 2d 975 (1942, CA 2). Subsequent Seventh Circuit decisions, including the case upon which Petitioner relies, *In Re Gar-*

den City Brewery, Inc., 208 F. 2d 377 (1953, CA 7), specifically adopt the *Morris Plan* rationale.

Even if the Court of Appeals applied the "substantial evidence" rule, which it did not, Petitioner was not prejudiced by a more restrictive review of the evidence than the "clearly erroneous" doctrine requires.

III.

The courts below relied upon decisions of the Supreme Court of Indiana on the applicable question of state law. Their reliance on the rule, with which courts of other jurisdictions concur, was not adverse to any other existing state rule.

IV.

The statutory directive requiring Respondents to prove a partnership in law and fact has not been violated by inference. Petitioner fails to properly interpret the distinction between proof of a partnership in law and fact and partnership by estoppel. The former may be established from conduct proving intent to form a contractual entity. The latter requires proof of representations upon which a third person relies in extending credit. No creditors knew of the documentary evidence taken from the files of the alleged bankrupts in the case at bar. Neither was there proof of reliance in extending credit based upon the existence or import of those documents. Contrariwise, the documents revealed Petitioner's legal intent to conduct business as a partnership with his brother. Therefore, this Court should not review Petitioner's misinterpretation of the opinions below.

ARGUMENT.

I.

THE DISTRICT COURT PROPERLY REVERSED THE REFEREE IN BANKRUPTCY.

Petitioner first asserts that the District Judge should not have reversed the Referee in Bankruptcy (Pet. for Writ 2, 5). The asserted error is predicated on the alleged existence of "some competent" evidence to sustain the Referee's findings (Pet. for Writ 5, 7). Such a contention misinterprets the District Court's scope of review.

The Bankruptcy Act specifically empowers the Court to

> "consider records, findings and orders certified to the Judges by Referees and confirm, modify, or reverse such findings and orders. * * *" 11 U.S.C. § 11(10).

That statutory authority has been narrowed by General Order 47 which directs the District Judge to "accept the findings of fact" of the Referee unless *clearly erroneous*.

The words *clearly erroneous* describe the District Court's reviewing power. That doctrine is also embodied in Rule 52(a) of the Federal Rules of Civil Procedure. Both the General Order and Rule were promulgated by this Court.

The rule has its roots in equity practice.

> *Katz Underwear Co.* v. *United States*, 127 F. 2d 965 (CCA 3, 1942);
>
> *Aetna Life Insurance Co.* v. *Kepler*, 116 F. 2d 1, 4-5 (CCA 8, 1941);
>
> *State Farm Mutual Auto Ins. Co.* v. *Bonacci*, 11 F. 2d 412 (CCA 8, 1940).

Before 1912 oral testimony was neither admissible nor admitted in equity trials.

District of Columbia v. *Pace*, 320 U.S. 698, 701 (1944);

Morby Construction Co. v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1939).

Evidence was limited to written depositions and interrogatories.

Clark and Stone, *Review of Findings of Fact*, for U. Chi. L. Rev. 190, 204 (1937).

Consequently, equity appeals were *de novo* because the reviewing Court was in at least an equal, if not superior, position to judge the evidence.

Stern, *Review of Findings of Administrators, Judges and Juries, A Comparative Analysis*, 58 Harv. L. R. 70, 79 (1944).

In 1912 the Federal Equity Rules were adopted. Thereafter, oral testimony was permissible.

Federal Equity Rule 46.

Logic then demanded abandonment of *de novo* appeals because the credibility of witnesses became an additional issue. As a result, Appellate tribunals lost testimonial equality because review was confined to the "cold print" of the record. Reason required that great weight attach to the trial Court findings of fact. Thereafter, equity appellate decisions proclaimed that the findings of fact would be subsequently accepted unless "clearly erroneous".

Stern, *Review of Findings of Administrators, Judges and Juries, A Comparative Analysis*, 58 Harv. L. R. 70, 79 (1944).

See also cases cited in official note to Rule 52, Federal Rules of Civil Procedure.

However, equity did not abandon the power of the reviewing Court to weigh the evidence.

District of Columbia v. *Pace*, 320 U.S. 698, 702 (1944).

In other words, the withdrawal from *de novo* appeals required by the introduction of oral testimony was not a retreat to the confinement of the "substantial evidence" rule.

The "substantial evidence" rule, historically applicable in appeals at law, requires acceptance of the verdict if there is "substantial evidence" to support it.

Stern, *Review of Findings of Administrators, Judges and Juries, A Comparative Analysis*, 58 Harv. L. R. 70, 73 (1944).

The existence of *SOME* evidence, as Petitioner contends, does not meet the prescribed test.

N. L. R. B. v. *Columbian Co.*, 306 U.S. 292, 300 (1939).

The "substantial evidence" rule has been applied to reviewable fact findings by both judges and juries in cases at law and administrative agencies.

The logic in the application of the rule to jury decisions is because the findings are made by persons embodying the underlying sense of fairness of the community. And, the same rule has been applied to judicial decisions in the absence of a jury only because the action was at law. To secure the advantage of specialization, the doctrine also has been applied to administrative agency determinations.

Stern, *Review of Findings of Administrators, Judges and Juries, A Comparative Analysis*, 58 Harv. L. R. 70, 81, (1944).

In short, the "substantial evidence" rule prohibits reversal of findings of fact contrary to the weight of the evidence if supported by sufficient evidence for a reasonable man to concur with the conclusion reached.

> *N. L. R. B.* v. *Columbian Co.*, 306 U.S. 292, 300 (1939).

The *clearly erroneous* doctrine, however, would permit such a reversal.

> "To what extent does this 'clearly erroneous' test differ from the 'substantial evidence' rule? In giving effect to the latter, courts determine not merely whether there is 'some' evidence to support a finding, but whether there is enough from which a reasonable man could draw the conclusion reached. If the court believed that a reasonable man could reach the conclusion, could it hold the conclusion 'clearly erroneous' Theoretically, at least, it could; 'I agree that a reasonable man could make such a finding, but I think it 'clearly wrong.' "
>
> Stern, *Review of Findings of Administrators, Judges and Juries, A Comparative Analysis*, 58 Harv. L. R. 70, 80, 81 (1944).

That the "clearly erroneous" doctrine is less restrictive than the "substantial evidence" rule was acknowledged at the time the Federal Rules of Civil Procedure were adopted. Former Attorney General William D. Mitchell, Chairman of the Advisory Committee, appointed by the Supreme Court of the United States to draft the rules, said:

> "The committee chose the broader view so that the rule now applying to all cases without a jury (including actions at law) is practically the modern equity rule. It is not the ancient rule that allowed a trial '*de novo*' on the facts in the Appellate Court * * * it is a limited provision * * * the Appellate Court may not set aside the findings unless they are 'clearly

erroneous' or against the CLEAR WEIGHT of the evidence." Proceedings of the Institute on Federal Rules (Cleveland, Ohio), (American Bar Association, 1938) 318. (Emphasis supplied).

The Federal Rules of Civil Procedure, including Rule 52(a) became effective in 1938.

Rule 86(a), Federal Rules of Civil Procedure.

Thereafter, the identical language was incorporated in General Order 47 which became effective February 13, 1939.

Therefore, Petitioner's allegation of error in the District Court order reversing the Referee because of the alleged existence of SOME competent evidence is legally, historically and logically unfounded. The presence of some evidence would not support the Referee's decision under the "substantial evidence" rule, and certainly it would not satisfy the less restrictive "clearly erroneous" doctrine.

The applicable test concerns the sufficiency, quantum or weight of the evidence. The District Court, with greater experience, found that weight demanded reversal of the Referee. In so doing he denominated each contested finding of fact and all the conclusions of law "clearly erroneous." (Petitioner's Appendix 90-92).

The record supports the District Court's proper application of his restricted power of review. Respondents' evidence consisted primarily of documents obtained from the files of the alleged bankrupts. (Respondents' Appendix 99-151). These documents marked a course of conduct consistent only with an intent of Petitioner to form a partnership with his brother.

Petitioner's testimony denied the efficacy of the documents and orally contradicted their import. (Pet. for Writ 5, 6). The Judge disregarded those explanations and denials made at a time when Petitioner faced substantial liability. He determined Petitioner's prior conduct contradicted and outweighed his testimony.

That determination by the District Judge and the attendent reversal was a valid application of the test prescribed by General Order 47.

The determination was further aided by the Court's unquestioned right to independently interpret the documentary evidence as a matter of law.

> *In Re Kelley*, 85 F. Supp. 316 (1949, D.C., Cal.);
> *In Re Hedgeside Distillery*, 123 F. Supp. 933, 942 (1952, D.C., Cal.);
> *In Re Fergus Falls Woolen Mills Co.*, 41 F. Supp. 355, 360 (1941, D.C., Minn.).

And further the Judge was unhampered by "cold print" of the record because Petitioner's oral denials and explanations were largely uncontradicted except by documentary evidence. As a result, the issue of credibility was effectively removed.

Therefore Respondents contend Petitioner's first assertion is groundless, legally and factually. It quarrels with the District Court's determination with which the Court of Appeals concurred. Two Courts have decided adversely to Petitioner. Customarily, this Court has not and should not in the instant case permit a third review of fact questions.

> *Comstock* v. *Institutional Investors*, 335 U.S. 211, 214 (1948) and the fifteen cases therein cited.

II.

THE COURT OF APPEALS DID NOT EXCEED ITS SCOPE OF REVIEW NOR IS THERE A CONFLICT IN THE CIRCUITS AS TO THE EXTENT OF THAT POWER.

Petitioner secondly contends that the Court of Appeals erroneously sustained the order of the District Court reversing the Referee. Two grounds allegedly support that contention: first, that the Court of Appeals exceeded its scope of review; and second, that the Courts of Appeal are in conflict on the extent of that power (Pet. for Writ 2, 4).

General Order 47 is directed to District Courts.

> "Unless otherwise directed in the order of reference, the report of a Referee or of a special master shall set forth his findings of fact and conclusions of law, and the Judge shall accept his findings of fact unless clearly erroneous." General Order 47.

It enunciates the "clearly erroneous" doctrine of review. The meaning of the doctrine has heretofore been discussed.

Customarily, Rule 52(a) of the Federal Rules of Civil Procedure governs the scope of review of Courts of Appeal. That rule also incorporates the "clearly erroneous" doctrine.

> "Findings of fact shall not be set aside unless clearly erroneous * * *"
>
> Rule 52(a) Federal Rules of Civil Procedure.

Therefore, the District Court and the Court of Appeals have the identical scope of review. Respondents have hereinabove contended the District Court committed no error when it reversed the Referee. If the District Court did not err, it follows logically that the Court of Appeals properly sustained the District Judge (See above pages 6-11).

Neither are the opinions of the Courts of Appeal interpreting General Order 47 and Rule 52(a) of the Federal Rules of Civil Procedure in conflict on the application of that doctrine of review.

Petitioners allege there is a conflict in the following cases:

In Re Dayal, 103 F. 2d 653 (1939, CA7);
In Re Garden City Brewery, Inc., 208 F. 2d 377 (1953, CA7), and
Morris Plan Industrial Bank v. *Henderson*, 131 F. 2d 975 (1942, CA2).

The original General Order 47 was issued pursuant to Section 30 of the 1898 Bankruptcy Act. It read as follows:

"The reports of Referees in all proceedings under the Act and of special masters in proceedings under Section 77 and Section 77B of the Act, shall be deemed presumptively correct but shall be subject to review by the court, and the court may adopt the same or may modify or reject the same, in whole or in part, when the court is fully satisfied that error has been committed."

4 Collier, *Bankruptcy*, 2218 (14 Ed. 1942).

That language was amended by order of this Court effective February 13, 1939. The amendment substituted the "clearly erroneous" rule for the presumption of correctness previously accorded the Referee's findings.

The opinion in the *Dayal* case was announced April 28, 1939.

The *Dayal* decision interpreted the prior General Order because the General Order amendment was not in effect when the District Court reviewed the Referee's findings in that case.

However, the Federal Rules of Civil Procedure took

effect in the fall of 1938.

Rule 86(a) Federal Rules of Civil Procedure.

That rule specifically bound the Federal Courts to application of the Federal Rules in pending cases.

Therefore, the Court of Appeals for the Seventh Circuit was bound by Rule 52(a) in the *Duval* case, but the District Court had applied the unamended General Order 47. This distinction was recognized by the Second Circuit in the case upon which petitioner relies.

Morris Plan Industrial Bank v. *Henderson*, 131 F. 2d 975, 976 (1942, CA2).

Because the rules of review were not identical, the Court of Appeals for the Seventh Circuit, temporarily, properly applied Rule 52(a). In so doing, it held in part as follows:

> "We do not think that it can be held that the District Court is bound by the substantial evidence rule with regard to the findings made by the Referee. While the rule makes the Referee's findings presumptively correct, yet, the Court is vested with authority to reject the same, in whole or in part, when the court, in the exercise of its judgment, is fully satisfied that error has been committed. That language cannot, in our judgment, be the equivalent of the 'substantial evidence' rule. Of course, the judgment exercised by the Court must not be arbitrary, but when there are facts and circumstances concerning which reasonable minds might differ, we think the Court, after indulging in the presumption which the rule accords the Referee's report, may exercise its judgment even though it may be contrary to the finding as made by the Referee, and when the Court's judgment has been thus exercised, *we do not think we are at liberty to disturb the same except where we might conclude there was no substantial evidence or theory which would justify the Court in reaching*

a conclusion contrary to that of the Referee". (Emphasis supplied).

In Re Duval, 103 F. 2d 653, 656 (1939, CA7)

The Court thus recognized the then existing dichotomy between Rule 52(a) and General Order 47.

Subsequently, the amended General Order 47 became effective. The decision in the *Morris Plan* case followed.

That opinion interpreted the General Order and the rule in concert. Consequently, the Court of Appeals for the Second Circuit held the question presented to it was identical with that presented to the District Court.

Thereafter, for a short time, the Seventh Circuit continued to apply the dichotomy of the *Duval* case rationale, perhaps, erroneously. However, one case upon which Petitioner relies specifically adopts the *Morris Plan* rule in the following words:

> "Nothing contained in this record warrants departure from our holding in the case *In Re Skrentny*, 199 F. 2d 488, 492, wherein we said, 'General Order 47 is binding not only on the Court of Appeals but also on the District Judge sitting in bankruptcy.' The findings of the Referee should be accepted by the District Court except in plain cases. *Epstein* v. *Steinfeld*, 210 F. 236-237, *In Re Wolf*, 165, F. 2d 707, 710. In the case at bar, we have pointed out generally the testimony and evidence presented to the Referee. We find no good reason for refusing to accept his findings of fact. They appear to us to be supported by substantial evidence. CF *Morris Plan Bank* v. *Henderson*, 2 cir., 131 F. 2d 970."
>
> *In Re Garden City Brewery, Inc.*, 208 F. 2d 377 (1953, CCA 7).

Therefore, the opinions of the Seventh Circuit are now in accord with the leading case in the Second Circuit.

This conclusion is based upon Petitioners own cited authority.

Petitioner further erroneously contends that the Court of Appeals decided the instant case on the authority of the *Duval* and *Garden City* cases. The opinion of the Court observed that Respondents' herein contended a more liberal rule of review applied in the Seventh Circuit (Pet. for Writ Appendix 12). However, it cited no cases to support its own application of the "clearly erroneous" doctrine (Pet. for Writ Appendix 13).

What may appear to Petitioner and could have appeared to the Court of Appeals as contrariety in the opinions of other Circuits may be attributable to the questions presented. Illustratively, all of the Courts of Appeal uniformly hold that if the Referee and the District Judge concur, an even more stringent rule of review applies analogous to the "Two Court rule of this Court." Decisions in such cases hold that only a "clear mistake", "unsupported conclusion", "plain case" will result in reversal of that concurrence.

Heath, et al v. *Helmick*, 173 F. 2d 156, 161 (CA 9, 1949);

In Re Pringle Engineering & Mfg. Co., 164 F. 2d 299, 303 (CA 7, 1947);

In Re Garver & Opray, Inc., 203 F. 2d 690, (CA 6, 1953);

Bonce v. *Chemical Plastics, Inc.*, 175 F. 2d 839, 841 (CA 8, 1949);

Abrams v. *Astor, et al*, 170 F. 2d 544, 545 (CA 2, 1948);

In R. Wolf, 165 F. 2d 707, 709 (CA 3, 1947);

R. M. Aden, as Trustee v. *R. A. Watkins*, 234 F. 2d, 925, 928 (CA 5, 1956).

However, where, as in the instant case, the District Court has reversed the Referee, two approaches appear. All opinions either sustain or reverse the District Court as a result of an independent review of the evidence. In so doing, some cases merely apply the clearly erroneous doctrine to the facts as reviewed.

In Re J. J. Tyne, 257 F. 2d 310, 312, (CA 7, 1958);
In Re C. B. Porterfield, 249 F. 2d 634, 636, (CA 5, 1957).

Others observe the language of General Order 47 which does not restrict the Judge's statutory authority to reverse conclusions of law or the finding of ultimate facts or mixed questions of law and fact.

Costello v. *Fazio*, 256 F. 2d 903, 908, (1956, CCA 9);
In Re Pioch, 235 F. 2d 903, 905 (1956, CA 3);
In Re Topper, 229 F. 2d 691, 692, 693, (1956, CA 3);
In Re Morasco, 233 F. 2d 11, 15, (1956, CA 2).

That a reviewing tribunal may make unrestricted and independent findings of ultimate fact as a matter of law has been approved by this Court.

> "The consequence of a 'finding of fact' depends on the nature of the materials on which the finding is based * * * finding so called ultimate 'facts' more clearly implies the application of standards of law * * * Though labeled 'finding of fact', it may involve the very basis on which the judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court."
> *Baumgartner* v. *United States*, 322 U.S. 665, 670-671 (1944).

The Court of Appeals reviewed the evidence in the instant case.

> "We have made a careful study of the testimony and have no hesitancy in stating that if we were the triers of the facts, we would, as the District Court did, reach a conclusion different from that of the Referee." (Petition for Writ Appendix 13).

The Court then, correctly applied the "clearly erroneous" doctrine.

> "Even with the serious limitation which General Order 47 places upon the authority of a District Court to set aside an order of a Referee, we still think the District Court reached the correct result." (Pet. for Writ Appendix 13).

Furthermore, the Court of Appeals also, secondarily, stated that the General Order restriction did not apply to conclusions of law or of ultimate fact.

> "It must be kept in mind that General Order 47 is directed in the findings of the Referee and not in the conclusions drawn therefrom. It is apparent that the Referee, erroneously we think, treated the issue of partnership as one of fact. In our judgment it is a conclusion or at any rate an ultimate fact to be deduced from those which are evidentiary." (Pet. fo. Writ Appendix 13).

That portion of the opinion was particularly appropriate to the facts in the instant case. The basic difference between the opinions of the Referee and the District Court concerned proof of partnership existence. The Referee examined some isolated tests of that existence and found adversely to Respondents. Respondents contended before the Referee, the District Judge and the Court of Appeals that the evidence when viewed as a whole, established partnership existence. Additionally, Respondents objected to the introduction of opinion evidence by third persons con-

cerning whether they dealt with the Petitioner as a partner. The Referee admitted that testimony. The Court of Appeals properly rejected it.

> "That the Referee treated the issue of partnership as one of fact (as opposed to ultimate fact) is further emphasized by the admission, over objection, of a line of testimony which permitted lay witnesses to express their opinion on that issue * * * it is reasonable to think that the Referee attached weight to this line of improper evidence, and it is equally reasonable to think that the District Court, as it had a right to do, discarded it." (Pet. for Writ Appendix 14).

Furthermore, the findings of fact of the Referee failed to find any evidence in the record to substantiate Respondents' allegations of partnership existence. (Petitioner's Appendix 26-27). To so find required the Referee to ignore the entire course of conduct recognized by the District Judge and the Court of Appeals as constituting a partnership in law. (Petitioner's Appendix 90-92; Petition for Writ Appendix 14-16).

Therefore, the District Court and the Court of Appeals properly corrected the newly appointed Referee's legally mistaken interpretation of the issue before him. Both Courts did so in accordance with the *clearly erroneous* doctrine as enunciated by General Order 47 and Rule 52(a) of the Federal Rules of Civil Procedure.

Even if the Court of Appeals had applied the "substantial evidence" rule, which it did not, Petitioner would not have been prejudiced because that rule is more restrictive than the "clearly erroneous" doctrine.

Therefore, Respondents contend the Court of Appeals did not abuse its scope of review, nor are the Circuits in conflict as to the extent of that power. In truth, Petitioner seeks a third review of the facts which this Court should deny.

III.

THE FEDERAL COURTS HAVE NOT DECIDED AN IMPORTANT QUESTION ON THE LAW OF PARTNERSHIP ADVERSELY TO APPLICABLE STATE LAW.

Petitioner thirdly complains the decisions of the District Court and the Court of Appeals conflict with applicable state law. (Pet. for Writ 4).

Respondents concede the applicable partnership law is state law.

> *In Re Brunson* v. *Burch*, 79 F. Supp. 833, 834 (1948, D.C. Cal.).

Burns' Indiana Statutes § 50-401, et. seq., codifying the Uniform Partnership Act is the Indiana state law. However, that statute is not set forth in the Petition for Writ in contravention of Rule 40(c) of the Rules of the Supreme Court of the United States.

Respondents further acknowledge that partnership is a contractual relationship as announced in the case Petitioner cites.

> *Watson* v. *Watson*, 231 Ind. 385, 108 N.E. 2d 893, 895 (1952).

The statutes prescribe only some, but not all of the tests, for determining partnership existence. Because the formation of a partnership is contractual, the intention of the parties to form such an entity is perhaps the most important single test. The cases interpreting the Uniform Partnership Act, including even the case Petitioner cites, so hold.

> "It is the substance and not the name of the arrangement between them which determines their legal relation towards each other, and if, from a consideration of all the facts and circumstances it appears that the parties intend, between themselves, that there

should be a community of interest of both property and profits of a common business venture, the law treats it as their intention to become partners."

Watson v. *Watson*, 231 Ind. 385, 108 N.E. 2d 893, 895 (1952).

Accord:

Mercer v. *Vinson*, 85 Ariz. 280, 336 P. 2d 854 (1959);

Long Beach v. *Kirk*, 165 Cal. App. 2d 470, 332 P. 2d 131 (1959);

Peck v. *Peck*, 21 Ill. App. 2d 118, 157 N.E. 2d 279 (1959);

Barnes v. *Barnes*, 355 Mich. 458, 94 N.W. 2d 829 (1959).

That intent may be proved by the conduct of the parties.

Keen v. *Jason*, 19 N.Y. Misc. 538, 187 N.Y.S. 2d 825 (1959);

Walling v. *Plymouth Mfg. Co.*, 139 F. 2d 78 (CA 7, (1943);

Joseph v. *Donover Co.*, 261 F. 2d 812 (CA 8, 1959);

Haulk v. *Fry*, 167 Neb. 398, 193 N.W. 2d 183, (1958);

Vlamis v. *De Weese*, 216 Md. 384, 140 A. 2d 665 (1958).

The District Judge in his memorandum of opinion set forth the conduct indicating Petitioner's intent (Petitioner's Appendix 90-92).

The Court of Appeals did likewise.

"It would unduly burden this opinion to give more than a brief summary of the evidence heard by the referee. It is pertinent to note that much of it was documentary, which the district court was in as good a position as the referee to evaluate. For instance, the

two businesses in question each maintained an account in the Mercantile National Bank and later in the Calumet National Bank. These accounts for both businesses were obtained in each bank pursuant to a partnership authority. These authorities were substantially in the same form. That given to the Calumet National Bank reads, "The undersigned desire to establish with you a demand deposit and checking account to be known as Chicago Wholesale Distributors, and the undersigned hereby certify that the said name is a partnership trade name used in the conduct of an unincorporated business, owned entirely by the undersigned as co-partners." This authority further states, "We have agreed that checks and orders for the payment of money withdrawing funds from said amount may be signed in the name of the partnership by any one (1) of the following named persons: Joseph Namoff, Ida Namoff (wife of Joseph), Julius Namoff." Each of these parties signed the authority as a partner in Chicago Wholesale Distributors. The similar authority given to the Mercantile National Bank provided that only two persons were permitted to draw on said account, namely, Julius Namoff, Jr. and Ida Namoff. In this connection, it is significant that while Joseph claimed to be the sole proprietor of the businesses he was not permitted to draw checks on the account maintained in the Mercantile National Bank. On the other hand, Julius, who denies he was a partner, was one of the two persons authorized to draw on this account. On at least two occasions money was borrowed from the banks on notes signed by Julius, Ida and Joseph, and deposited in the accounts of the businesses. Payments of these bank loans were made by checks on which Julius was a co-signer, on the accounts of the businesses.

During the relevant period there were in force and effect at least four insurance policies covering the named businesses. These policies were purchased and issued in the names of Joseph E. Namoff and Julius Namoff, doing business as Junior's Country Fair and

Chicago Wholesale Distributors. Another policy was issued in the name of Julius Namoff, naming Julius as assured, d b a Junior's Country Fair, located at 7046 Kennedy Avenue, Hammond, Indiana. At least six other policies listed Julius d b a Junior's Country Fair. All of these policies were paid for out of the accounts of the alleged partnership business. Julius was insured under a Blue Cross Hospitalization policy purchased and paid for by the businesses. An invoice for merchandise, addressed to Julius, was paid by check signed by Julius and drawn on the account of Chicago Wholesale Distributors. The original deposit required to obtain electrical service for the said businesses was paid by Julius. A store license was purchased by Julius for Junior's Country Fair. Throughout the conduct of these businesses trucks were used which were owned by Julius and registered in his name. Checks for car expense were drawn on these business accounts, payable to Julius. Receipt forms were used which listed a business admittedly owned by Julius individually and one of the businesses in question. Julius carried an Illinois Bell Telephone credit card issued and paid for by the named businesses."

Both Courts applied those facts to the law announced in an Indiana Supreme Court case.

> "It may be stated that when parties agree to do that which at law constitutes or creates a partnership, it is not material that the parties declare it shall not be such an association. While the intent of the parties is material, it is not the intent to do or to accomplish certain given things as such things are construed in the law."

That doctrine was subsequently adopted in *Watson* v. *Watson*, 231 Ind. 385, 108 N.E. 2d 893, 895 (1952), and by many other cases in every jurisdiction of which the following are representative:

> *Nelson* v. *Seaboard Surety Co.*, 269 F. 2d 882 (CA 8, 1959);

Wyman v. *Davis*, 223 So. C. 172, 74 S.E. 2d 694 (1953);

Eggleston v. *Eggleston*, 228 N.C. 668, 47 S.E. 2d 243 (1958);

Goldberg v. *Goldberg*, 95 N.Y.S. 2d 77, 276 App. Div. 1084 (1958).

Furthermore, Petitioner has failed to point out any general importance attachable to the rule properly applied by the courts below. Respondents submit there is none.

Therefore, Respondents contend Petitioner's third complaint unfounded seeks only another review of the factual issues presented which should be denied by this Court.

IV.

THE COURT OF APPEALS DID NOT ALTER THE STATUTORY DIRECTIVE REQUIRING PROOF OF PARTNERSHIP IN LAW IN BANKRUPTCY CASES.

Finally, Petitioner complains the opinion below alters the statutory directive requiring proof of a partnership in law and fact in bankruptcy cases.

11 U.S.C., Section 23(a).

He contends documentary evidence of conduct consistent with partnership intent establishes only a partnership by estoppel. (Pet. for Writ, 9)

Petitioner, however, fails to distinguish between conduct evidencing legal intent to establish a contractual relationship from conduct upon which a third person might have relied in extending credit.

According to the applicable Indiana law, the two types of partnership liability are defined as follows:

> "A partnership is an association of two or more persons to carry on as co-owners a business for profit."

Ind. Acts, 1949, Ch. 114, p. 283;
10 Burns' Ind. Statutes, Pt. 1, 355, §50-406, Partnership Defined.

"When a person, by word spoken or written, or by conduct represents himself, or consents to another representing him to anyone as a partner in an existing partnership, or with one (1) or more persons not actual partners as liable to any such persons to whom such representation has been made, who has on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner as liable to such person, whether the representation has, or has not been made, or communicated to such person so giving credit by or with the knowledge of the apparent partnership making the representation, or consenting to its being made."

Ind. Acts, 1949, Ch. 114, p. 283;
10 Burns' Ind. Statutes, Pt. 1, 360, §50-416, Partnership by Estoppel.

In the instant case, Respondents proof was of the conduct of Petitioner and his brother *inter sesse*.

This conduct established a legal intent to be partners, irrespective of the actual intent of the participants. . .

Only one witness testified that Petitioner represented himself as a partner. (Respondents' Appendix 96). Respondents remaining evidence consisted of documents from the files of the alleged bankrupts. Respondents introduced no testimony that any person knew of or extended credit in reliance upon the insurance policies, bank declarations of partnership, Blue Cross insurance coverage, business forms, advertising materials, payment of the utility deposit, bank loans, or store license purchase.

The Court of Appeals was thoroughly briefed on this question. It held:

"We think it plain that the acts and conduct of Julius and Joseph Namoff relative to the named Businesses, were such as to make the partnership as a matter of law." (Pet. for Writ, Appendix 14)

Respondents contend Petitioner misapprehends the import of that language of the Court of Appeals. It is not a ground for a rehearing in this Court to correct a construction based upon such a misapprehension.

Greenbay & Mississippi Canal Co. v. *Patent Paper Co.*, 173 U.S. 179, 180 (1899).

CONCLUSION.

Respondents pray the petition be denied with such sanctions and costs as this Court shall determine.

Petitioner has sought no more than a third review of the facts. Two competent tribunals have previously rejected his misapprehension of the case at bar.

No matter how tragic the facts and the resultant liability may be to the Petitioner, his petition fails to disclose error of sufficient import to challenge the imagination of this Court.

On the grounds set forth in this Brief in Opposition, this cause should rest undisturbed.

Respectfully submitted,

PORTER R. DRAPER,
504 Broadway,
Gary, Indiana,
Counsel for Respondents.

APPENDIX.

Rule 52(a) Federal Rules of Civil Procedure.

In all actions tried upon the facts without a jury or with an advisory jury the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court accepts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 86(a) Federal Rules of Civil Procedure.

These rules will take effect on the day which is three months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent

that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

Ind. Acts. 1949, Ch. 114, p. 283; 10 Burns' Indiana Statutes, Pt. 1, 355; § 50-406 Partnership Defined.

(1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

Ind. Acts. 1949, Ch. 114, p. 283; 10 Burns' Indiana Statutes, Pt. 1, 360; § 50-416 Partner by Estoppel.

(1) When a person, by words spoken or written, or by conduct, represents himself, or consents to another representing him to anyone, as a partner in an existing partnership or with one (1) or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

30 Stat. 547, July 1, 1898, c. 541, § 5; U.S.C., 11, § 23(a).

Same Partners. (a) A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

(Appendix)

30 Stat. 545, July 1, 1898, c. 541, §2 as amended; U.S.C., 11, § 10.

The courts of bankruptcy as defined in the previous chapter, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, and the United States courts in the District of Alaska, Hawaii, and Puerto Rico, are made courts of bankruptcy, and are invested, within their respective territorial limits as established on July 1, 1898, or as they may be thereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they were on July 1, 1898, or may be thereafter held, to • • • (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; • • •